the services to be rendered are of such a peculiar character that it is impossible to estimate the value of their loss by any pecuniary standard, and where it may be evident that they were not intended to be so measured. In such cases rescission is the only remedy.[1]

In *Henderson* v. *Hunton*[2] is discussed the somewhat interesting question of the validity of a deed made in consideration of the support and maintenance of the grantor, as against the latter's creditors.

ROBERT C. JACKSON.

Wytheville, Va.

THE SITUS OF DEBTS FOR PURPOSE OF TAXATION.

In treating of the situs of personal property no great difficulty is encountered as long as tangible personal property alone is considered. The law has fixed its situs by declaring in the maxim, "*mobilia personam sequuntur*," that personalty follows the domicile (not person) of the owner. But when the property is intangible, as debts and choses in action, more difficulty is encountered because of the failure to assign to this species of property a definite situs.

The question where choses in action shall be taxed has furnished the theme for much litigation. When the creditor resides in one State and the debtor in another, the right of each State to tax comes into question. Is the debt taxable at the debtor's residence, at the creditor's residence, or at the residences of both?

Debts and choses in action may be either negotiable or non-negotiable, and, for convenience, we may treat them under separate heads.

I. *Debts and Choses in Action non-negotiable.*

The general practice is to treat debts as located, for the purpose of taxation, at the *creditor's* domicile, and there is no doubt that they may have their situs there for that purpose.[3]

The creditor, it is conceded, is a permanent resident of the State imposing the tax. The debt is property in his hands, constituting a portion of his wealth, from which he is under the highest obligation,

[1] See Browne on Stat. Frauds, 593, and cases cited; Brown v. Sutton, 129 U. S. 238 Slanahan v. Swan (Ohio), 29 Am. St. Rep. 517; Kofka v. Rosicky (Neb.), 43 Am. St Rep. 696, 697.

[2] 26 Gratt. 926.

[3] Minor, Conflict Laws. 123.

in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys. That debt, although a species of intangible property, may, for the purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond.

That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with stipulated interest—remains. Nor is the debt for the purpose of taxation affected by the fact that it is secured by a mortgage upon real estate situated in another State.

This is the rule as laid down by the Supreme Court in *Kirtland* v. *Hotchkiss*,[1] and is generally followed by the State courts.

This right to tax the debt at the creditor's domicile is now almost universally conceded. But some courts have gone further and taxed the interest of the non-resident creditor in the hands of the resident debtor.[2]

The great weight of authority, however, has opposed such taxation on the ground that the debtor has no taxable interest in the debt. But such reasoning is based upon a misconception of the theory of such taxation.

It is conceded that the *debtor* has no taxable interest in the debt; no effort is made to tax any interest of the debtor; in fact the tax is not aimed at the debtor at all, but at the interest of the non-resident *creditor* in the hands of the resident debtor.

Professor Minor in his excellent work on the Conflict of Laws[3] says:

"It is conceded that the debtor has no property in the debt belonging to the creditor, but his obligation to pay is itself valuable property belonging to the creditor, at least after the debt becomes due and enforceable, and no reason is perceived why the State could not compel the debtor to pay a tax thereon, crediting him with the amount so paid on his debt."

On reason and principle this is certainly sound. The fiction that personal property follows the owner's domicile yields whenever it is necessary for purposes of justice that its actual situs be examined.[4] No property within a State is beyond the reach of the taxing power of

[1] 100 U. S. 491.

[2] R. R. Co. *v.* Collector, 100 U. S. 595; U. S. *v.* Erie Ry. Co., 106 U. S. 327; Bridges *v.* Griffin, 33 Ga. 113; Finch *v.* York County, 19 Neb. 50.

[3] Sec. 123.

[4] Green *v.* Van Buskirk, 7 Wall. 139.

the State unless designedly put beyond it by an unequivocal act of the sovereign power.[1]

Let us suppose A, of Virginia, to be indebted to B, of Maryland, in the sum of $500. We have seen that B is the owner of the credit and, as such, is justly subject to taxation by Maryland. Now are we to suppose that Virginia, within whose borders is the very property itself, viz., the right to sue and recover, is not to be allowed the right of taxation because, by a fiction of law, the debt has followed B into Maryland and out of the reach of the Virginia courts? Judge Cooley has said that taxation and protection are reciprocal, and that there cannot be one without the other.

Maryland, in the case suggested, protects the person of B because he is one of her citizens, but she offers him no protection in regard to his debt against A, of Virginia, and that is what she is taxing.

To recover his money from A, B must set in operation the courts of Virginia. If he recovers a judgment it must be executed in Virginia. All this was known to B at the time he lent the money to A. Can it be said, then, that the State of the debtor's residence shall not be allowed the right to tax the interest of the non-resident creditor in the hands of the resident debtor?

Taxation is an approximate compensation rendered by the inhabitants of a commonwealth, or the owners of property situated within its borders, for the protection afforded their persons or property by the government. The right of taxation is a necessary adjunct of sovereignty, as each State is sovereign with the exception of those powers which it has granted to the general government; if it does not infringe upon those powers its authority to tax property and persons within its borders will be limited only by its own constitution.[2]

Granting to Maryland the right to tax B's person, it would seem that Virginia has an equal right to tax the property of B situated within her borders—and the right to sue A and enforce the claim is property, as before shown.

The rule that personal property follows the domicile of the owner is a legal fiction only, and in every case legal fictions give way where justice is prevented or obstructed by their presence.

The case of *Wilcox* v. *Ellis*[3] seems to lean towards the above argument. In that case the court says:

[1] Robertson *v.* Land Com'rs, 44 Mich. 274.

[2] Cooley on Const., sec. 15.

[3] 14 Kan. 588, 19 Am. Rep. 107.

"Now, as the State of Illinois, and not Kansas, must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debts, etc., it would seem more just, if said debt is to be taxed at all, that the State of Illinois and not Kansas should tax it, and that we should not resort to legal fictions to give the State of Kansas the right to tax it."

Allowing a debt to be taxed at the domicile of the debtor, and the amount paid credited on the debt, has one great advantage politically. If a debtor be interrogated by the State concerning the debt, he will, in nine cases out of ten, tell the truth. Whether the tax be large or small, it will not injure him, but will be credited on his debt; whereas the creditor is always under temptation to have the credit assessed at less than its real value because the tax would be proportionately less.

In answer to this it must be admitted that this would work harshly on one set of debtors—namely, those who owed debts, but did not intend to pay them.

Whether or not the government must take notice of a class who owe but do not intend to pay is an open question. Professor Minor seems to think that the government should not notice such a class, and that the method of taxation here laid out would be highly proper and of great benefit to the State government.

If, as I have endeavored to show, a debt may be taxed and rightfully taxed at the domicile of either the creditor or debtor, the third part of the original question answers itself. If it may be taxed by either, of course it may be taxed by both.

Most States have preferred to leave debts to be taxed by the State of the creditor's domicile, holding that taxation by the State of the debtor's domicile was cumbersome and inconvenient and not to be resorted to except on rare occasions.

II. *Taxation of Negotiable Paper.*

In regard to taxation of debts evidenced by bills, notes and bonds (negotiable), two lines of decision exist.

The view which is probably the more logical is, that the paper is mere evidence of indebtedness and that the debt itself can have no actual situs, wherever the paper may be; hence the situs in the eye of the law is, as in the case of ordinary debts, at the residence of the creditor.[1]

In *State Bank* v. *Richmond*[2] it was held that notes held by a bank

[1] Cooley on Taxation, p. 15; State Tax on Foreign-held Bonds, 13 Wall. 300; New Orleans *v.* Insurance Co., 30 La. Ann. 876, 31 Am. Rep. 232; Goldgart *v.* People, 106 Ill. 25; Boyd *v.* Selma (Ala.), 11 South. 393.

[2] 79 Va. 113.

in this State, are taxable by the State no matter where the maker resides.

The other view is that the location of the paper determines the situs.[1]

If the notes, bills or bonds in question are in the hands of an agent they can probably be taxed at the agent's residence, under either of the above lines of decision, as being property in an agent's possession and coming under the general rules governing such property.[2]

In *Finch* v. *York County*[3] the court held that notes and mortgages in the hads of an agent who managed their collection and investment within the State acquired a situs there for the purpose of taxation. In this case the court said:

"The power of the legislature to separate, for the purpose of taxation, the situs of personal property, whether of a tangible nature or in the form of a chose in action, from the domicile of the owner, is unquestioned, and if such property, in any form, is within the jurisdiction, it may tax it."[4]

The above statement, however, is subject to the important qualification that the agent must be authorized to do some act in reference to the negotiable paper. If the owner keeps exclusive control over it, it is still in his possession. In other words, the agent must not be a mere custodian.

While, as we have seen, such securities may be taxed at the agent's residence, the authorities may exercise their option and assess them at the domicile of the owner instead.[5]

In the case of *Commonwealth* v. *Ry. Co.*[6] it was held that the State of Virginia could not tax the bonds of a railroad company held by persons living outside of the State. The court said:

"It seems pretty well settled by judicial decisions that the bonds of a corporation of this State, which are owned and held by inhabitants of another State, are not liable to taxation here."

E. S. MALONEY.

Charlottesville, Va.

[1] People *v.* Home Ins. Co., 29 Cal. 533; Redmond *v.* Rutherford, 87 N. C. 133; Pappleton *v.* County, 18 Oregon, 377.

[2] 25 A. & E. Enc. L. 148.

[3] 19 Neb. 50.

[4] Tazewell Co. *v.* Davenport, 40 Ill. 197; Swallow *v.* Thomas, 15 Kan. 68; Tappan *v.* National Bank, 19 Wall. 49; Catlin *v.* Hill, 21 Vt. 152.

[5] Curtis *v.* Richland, 56 Mich. 478.

[6] 27 Gratt. 344 (decided in 1876).